

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 62605-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JEFFREY McKEE,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>September 28, 2009</u>
)	
)	

Cox, J. — To challenge an issue for the first time in a second appeal, the appellant must demonstrate that the trial court, on remand, reviewed and ruled again on such issue.¹ Because Jeffrey McKee challenges a condition of community custody imposed in his sentence for the first time in this second appeal, we do not address his challenge.²

In 2005, a jury found McKee guilty on two counts of first degree rape, both with firearm enhancements.³ McKee requested an exceptional minimum sentence below the standard range.⁴ The trial court granted McKee's request and imposed the minimum base sentence for each of the rapes to be served

¹ State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993); State v. Traicoff, 93 Wn. App. 248, 257, 967 P.2d 1277 (1998).

² We deny McKee's Motion to Modify the ruling of the Clerk/Administrator denying his motion for a continuance to file his Statement of Additional Grounds. We also deny his Motion to Stay Proceedings.

³ State v. McKee, 141 Wn. App. 22, 28-29, 167 P.3d 575 (2007), review denied, 163 Wn.2d 1049 (2008).

⁴ Id. at 29.

concurrently rather than consecutively.⁵ The trial court also imposed certain conditions of community custody including restrictions on alcohol and pornography, and mental health evaluation and treatment.⁶ McKee appealed.⁷

One of McKee's arguments on appeal was that the trial court did not have the statutory authority to impose the conditions of community custody prohibiting him from possessing alcohol and pornography.⁸ McKee did not challenge the condition requiring mental health evaluation and treatment. The state cross-appealed the exceptional minimum sentence.⁹

In a published opinion,¹ this court upheld McKee's conviction and concluded that the trial court abused its discretion by imposing an exceptional minimum sentence.¹¹ Regarding the conditions of community custody, this court concluded that the conditions regarding alcohol were beyond the statutory authority of the trial court.¹² We also concluded that the condition regarding possession of pornography was valid, but we suggested that the trial court might clarify the definition on remand.¹³ We remanded to the trial court for

⁵ Id. at 29-30.

⁶ Id. at 30

⁷ Id.

⁸ Id. at 34-35.

⁹ Id. at 30.

¹ McKee, 141 Wn. App. 22.

¹¹ Id. at 34, 39.

¹² Id. at 34.

resentencing within the standard range, removal of the invalid conditions concerning alcohol, and clarification of the definition of pornography.¹⁴

At the resentencing hearing on November 3, 2008, the court imposed the low end of the standard range plus a firearm enhancement for each count, to be served consecutively. Addressing the community custody conditions, the trial court deleted the alcohol prohibition and clarified the definition of pornography. The court again imposed the condition requiring McKee to “obtain a mental health evaluation . . . and complete all treatment recommendations” if directed. The court did not address any other sentencing condition.

McKee again appeals.

TIMELINESS OF APPEAL

McKee argues that the trial court erroneously imposed the mental health evaluation and treatment as a condition of community custody in violation of the Sentencing Reform Act of 1981 (SRA). We do not reach the issue because his assertion is untimely.

Review of issues raised for the first time on appeal is governed by RAP 2.5(c)(1), which states:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

¹³ Id. at 36-37.

¹⁴ Id. at 34-37.

In State v. Barberio,¹⁵ our supreme court held that this rule does not automatically permit review of every issue or decision that was not raised in an earlier appeal.¹⁶ Rather, review in a second appeal is only guaranteed if the trial court “on remand, exercised its independent judgment, reviewed and ruled again on such issue”¹⁷

Accordingly, the deciding factor here is whether the trial court, on remand after the first appeal, reviewed the condition of community custody requiring McKee to undergo mental health evaluation and treatment. The record is clear. McKee did not challenge the mental health condition during his first appeal and the trial court did not revisit the condition. The trial court corrected the sentence to fall within the standard range plus the firearm enhancements, deleted the alcohol prohibitions, and clarified the definition of pornography. Because the trial court did not address the issue that McKee now raises for the first time in this second appeal, we do not reach it.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

¹⁵ 121 Wn.2d 48, 846 P.2d 519 (1993).

¹⁶ Id. at 50.

¹⁷ Id. at 50.

Elemyon, J.

Becker, J.